

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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(240) 777-6600

Case No. A-6412

PETITION OF JULIO GONZALEZ DEL SOLAR

OPINION OF THE BOARD

(Opinion Adopted September 25, 2013)
(Effective Date of Opinion: October 21, 2013)

Case No. A-6412 is an application for a 63.20-foot variance from the 88.20-foot established front building line (Locust Avenue) required by Section 59-C-1.323(a). The applicant proposes to construct a new single family dwelling.

The Board of Appeals held a hearing on the application on June 26, 2013. Curt Schreffler and James Ochs of CAS Engineering appeared and testified at the hearing. Only four members of the Board were present. At the conclusion of the proceedings, the Board left the record open, and ordered a transcript of the hearing for the fifth Boardmember to read so that he could participate in the Board's decision. The Board reconvened the hearing on July 10, 2013, and on a motion by Stanley B. Boyd, seconded by Carolyn J. Shawaker, with John H. Pentecost and Catherine G. Titus, Chair, in agreement, and David K. Perdue, Vice-Chair necessarily absent, the Board voted to schedule an additional hearing date to receive additional testimony and evidence on two issues: 1) whether the variance requested is the minimum reasonably necessary to overcome the unusual characteristics of the subject property; and 2) the applicability of the doctrine of zoning merger to this application.

The Board held a second hearing on the application on September 25, 2013. Rebecca Walker, Esquire, appeared on behalf of the applicant. Curt Schreffler also appeared.

Decision of the Board: Variance **Granted**.

EVIDENCE PRESENTED

1. The subject property is a vacant lot, Lot 1, Block B, Alta Vista Subdivision, located at 9300 Milroy Place, Bethesda, Maryland, 20814, in the R-60 Zone. It is located at the corner of Milroy Place and Locust Avenue.
2. The property is subject to an Established Front Building Line setback of 88.2 feet along Locust Avenue [Exhibit Nos. 6, 4(b), 4(c)].
3. The applicable established building line is based on the location of the houses on lots 19, 20 and the combined lot 21 and 22, of block B on Locust Avenue; those lots contain 18,995, 13,906 and 33,619 square feet respectively, compared with the subject property's 8,352 square feet [Exhibit No. 4(c)].
4. Under Section 59-C-1.323(a) of the Zoning Ordinance, the minimum front setback for the R-60 Zone is 25 feet.
5. With the requested variance of 63.2 feet, the proposed house would be set back approximately 25 feet from Locust Avenue, which is consistent with most of the houses in Block B on Milroy Place, with the confronting houses in Block A on Locust Avenue, and with the houses on Lots 23 and 24 on Locust Avenue. [Exhibit No. 4(c)].
6. The application of an 88.2-foot established building line to the subject property results in a building line that is actually located on abutting Lot 2 to the north, depriving the subject property of any buildable area [Exhibit No. 4(b)].

September 25, 2013 Hearing

7. Ms. Walker introduced Subdivision Plat No. 107, dated September 21, 1909, the original plat for this subdivision, showing a lot 19, which comprised some five acres and included what later became the subject property [Exhibit No. 18].
8. Lot 1, the subject property, was created in Plat No. 2111, dated January, 1948, entitled A Re-subdivision of Part of Lot 19 [Exhibit 4(d)]. Ms. Walker stated that 21 of the 22 original lots in this subdivision were improved with houses, which, she said, evidenced an intention that Lot 1 would be a buildable lot. [Transcript, September 25, 2013, p. 9].

9. Lots 19-24 on Locust Avenue (and Lot 26 on Alta Vista Road) were created in a Plat approved by the Maryland National Capital Park and Planning commission on May 29, 1986 [Exhibit No. 19].

10. Ms. Walker noted that the lot coverage in the two different subdivisions is distinctly different, with lots 19-22 being untypically deep and large for the R-60 Zone and the lot coverage for the proposed house and its cohorts created in 1948 being markedly consistent. She noted that the subject property is relatively narrow and shallow, at approximately 80 feet by 105 feet, and that the established building line from Locust Avenue (which actually lands on abutting Lot 2), renders the subject property unbuildable.

11. Addressing the issue of self created hardship in this case, Ms. Walker cited *Roeser v. Anne Arundel County*, 368 MD 294, 793 A. 2d 545, explaining that the Maryland Court of Appeals overruled the Anne Arundel County Board of Appeals for predicating their denial of an area variance on the fact that a purchaser acquired property knowing it would require a variance to be developable. The Court held that mere purchase of a property, even with knowledge that a variance would be needed, does not constitute a self-created hardship meriting denial of a variance request.

12. Ms. Walker stated that the lot coverage proposed for Lot 1 is approximately 2291 square feet, which is consistent with the nearby houses on Milroy Place, within the same subdivision. She emphasized that with the requested variance, the proposed house will meet the minimum, 25-foot front setback from Locust Avenue. She posited that the setback and proposed lot coverage, are reasonable.

Zoning Merger

13. In *Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 352 Md. 645, 724 A.2d 34 (1999), the Maryland Court of Appeals described zoning merger to be the merger for zoning purposes of two or more lots held in common ownership where one lot is used in service to one or more of the other common lots solely to meet zoning requirements. The Court later applied this doctrine in *Remes v. Montgomery County*, 386 Md. 52 (2005), 874 A.2d 470. In *Remes*, property owners of two lots, Lots 11 and 12, built a house on Lot 12, built a driveway over and through both lots serving the home on Lot 12, built a swimming pool on Lot 11 as an accessory use to the home on Lot 12, and built an addition to the house on Lot 12 that encroached into the setback on Lot 11. The Court noted that the lots had been assessed and taxed as a single lot. The Court held that Lots 11 and 12 merged for zoning purposes because they were under common ownership and were used in service to one another, in a way, as the Court first described in *Friends of the Ridge*, that restricted the future alienability

of Lot 11, because to convey it would have caused Lot 12 to violate the adjoining setback.

14. Ms. Walker distinguished the instant case from *Remes*, noting that the stone patio and walkway that traverse from Lot 2 to Lot 1 are not permanent structures, did not require building permits and can be easily removed. The structures therefore, do not render one lot in service to the other and do not create a non-conformance. Further, in the instant case, Lot 1 and Lot 2 have always been separate and have been taxed separately.

15. In response to a Board question, Ms. Walker stated that Mr. del Solar purchased Lot 1 and Lot 2 in 1986. She submitted a copy of the deed of conveyance into the record [Exhibit No. 20]. The deed identifies Lots 1 and 2 as two separate lots.

FINDINGS OF THE BOARD

Section 59-G-3.1. Authority – Board of Appeals

The Board of Appeals may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

The Board finds that the subject property is markedly shallower and narrower than Lots 19, 20, 21 and 22, whose setbacks comprise the calculation of the applicable established building line on Locust Avenue. The Board finds that the application of the established building line to Lot 1 (which actually places it on Lot 2), renders Lot 1 unbuildable, which imposes an undue hardship upon Mr. del Solar. The Board finds that this hardship is not the result of any action by the property owner, or his predecessors in title, and is therefore not self-created.

- (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;

The Board finds that the proposed house meets all required setbacks except for the established building line on Locust Avenue. On Locust Avenue, it will meet the 25-foot minimum setback for the R-60

Zone. It will be set back consistently with the confronting houses across Locust Avenue, on lots 23 and 24 in the same block of Locust, and with the other houses on Milroy Place. The proposed 2291 square feet of lot coverage is also consistent with the other houses in the neighborhood. Thus, the requested variance is the minimum reasonably necessary to place the house on the lot.

- (c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and

Construction of the proposed house on Lot 1 conforms with the applicable Bethesda-Chevy Chase Master Plan. It will meet the required side and rear setbacks for the R-60 Zone, and with the variance, will also meet minimum 25-foot setback from Locust Avenue. It meets the established building line from Milroy Place, and its setbacks are thus consistent with most of the houses in Block B on Milroy Place, with the confronting houses in Block A on Locust Avenue, and with the houses on Lots 23 and 24 on Locust Avenue.

- (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the board, under the guise of a variance to authorize a use of land not otherwise permitted.

The Board finds that allowing construction of the proposed house meeting the required side and rear setbacks for the zone, the established building line from Milroy Place, and the minimum setback from Locust Avenue, will create no infringement upon the privacy of neighboring properties, and no conditions leading to nuisance or trespass upon those properties, and that the variance therefore will not be detrimental to the use and enjoyment of adjoining or neighboring properties.

The Board finds that Lots 1 and 2 have not merged for zoning purposes, because the two lots are assessed and taxed separately, and because the walkway and patio that extend from Lot 2 onto Lot 1 are not permanent and create no non-conformity on either lot.

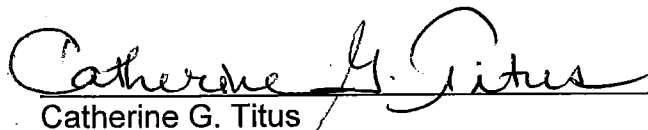
Therefore, based upon the foregoing the Board finds that the requested 63.20-foot variance from the 88.20-foot (Locust Avenue) should be granted.

Accordingly, the requested variance of 63.20 feet from the 88.20-foot established front building line is subject to the following conditions:

1. The Applicant shall be bound by his testimony and exhibits of record, to the extent that such evidence and testimony are identified in this Opinion.
2. Construction must be completed according to the plans entered in the record as Exhibit Nos. 4(a-c) and 5(a-d).

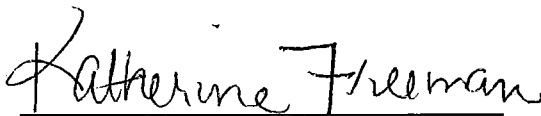
On a motion by John H. Pentecost, seconded by David K. Perdue, Vice-Chair, with Stanley B. Boyd, Carolyn J. Shawaker and Catherine G. Titus, Chair, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of October, 2013.



Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion

Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

(12)

(13)

(14)